STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

Terrell McCoy, #256070

Applicant,

vs.

State of South Carolina

Respondent.

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
Civil Action No. 2013–CP–10–1994

AMENDED[1] ORDER DENYING APPLICANT'S MOTION TO ALTER OR AMEND

Presiding Judge:	Hon. Deadra L. Jefferson
Respondent's Attorney:	J. Rutledge Johnson, Esq.[2]
Applicant's Attorney:	Rodney D. Davis, Esq.
Date of Hearing:	December 14, 2015
Court Reporter:	Denise Lauder

THIS MATTER comes before this Court by way of an Application for post-conviction relief, filed April 4, 2013. The Court convened an evidentiary hearing into the matter on December 14, 2015 at the Charleston County Courthouse. Applicant was present at the hearing and was represented by Rodney D. Davis, Esquire. Respondent was represented by J. Rutledge Johnson, Esquire, of the South Carolina Attorney General's Office. The Court denied relief by written Order, filed May 6, 2016.[3] On May 27, 2016, Applicant filed a "Motion Pursuant to Rule 59(a) &

[1] This Order is amended pursuant to a remand of the Supreme Court by Order filed February 1, 2019 and filed with the Charleston County Clerk of Court on February 26, 2019.

[2] After the evidentiary hearing, J. Rutledge Johnson, Esquire was replaced by Alicia Olive, Esquire as counsel for Respondent. At the time of this remand Megan Jameson, Esquire is representing the State.

[3] After the evidentiary hearing but before the filing of the Order of Dismissal, Melisa W. Gay, Esquire, was retained as counsel for Applicant. An Order of Substitution was filed with the Charleston County Clerk of Court on March 26, 2016. Subsequently, on March 21, 2018, Ms. Gay's license to practice law was suspended. On April 30, 2018 Clarissa Joyner, Esquire assumed representation of the Applicant.

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e) SCRCP."[4] However, the Applicant failed to serve the Court with the Motion upon filing. The Court subsequently was made aware of and received a copy of the Motion on January 25, 2017.

Rule 59(e) of the South Carolina Rules of Civil Procedure states that "(a) motion to alter or amend the judgment shall be served not later than 10 days after receipt of written notice of entry of the order." Rule 59(e), SCRCP. The purpose of Rule 59(e), SCRCP, to alter or amend the judgment is to allow the parties liberal opportunity to move for the trial judge to reconsider matters properly encompassed in a decision on the merits, regardless of whether the issues and arguments have been previously presented. "A party may wish to file such a motion when she believes the court has misunderstood, failed to fully consider, or perhaps failed to rule on an argument or issue, and the party wishes for the court to reconsider or rule on it. A party *must* file such a motion when an issue or argument has been raised, but not ruled on, in order to preserve it for appellate review." Elam v. South Carolina Dept. of Transp., 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004) (emphasis in original). "A party cannot use a motion to reconsider to present an issue he could have raised prior to judgment but did not." Anderson Memorial Hosp., Inc. v. Hagen, 313 S.C. 497, 498, 443 S.E.2d 399, 400 (Ct. App. 1994) (citing C.A.H. v. L.H., 315 S.C. 389, 434 S.E.2d 268 (1993)). See Arnold v. State, 309 S.C. 157, 172-73, 420 S.E.2d 834, 842 (1992).

Ineffective Assistance of Trial Counsel

The Applicant seeks relief from his conviction on the basis that he received ineffective assistance of counsel at his criminal trial in violation of the Sixth Amendment. He contends that trial counsel was ineffective for giving Applicant erroneous advice regarding self-representation and the consequences of proceeding *pro se*. The Sixth Amendment to the United States

[4] Respondent represented to the Court that despite the certificate of service attached to the motion, it had no record of being served with the Motion, prior to January 25, 2017, when the Court provided Respondent with a copy. Therefore, Respondent did not submit a response to the motion until February 6, 2017.

Constitution guarantees a defendant the right to effective assistance of counsel. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 2064 (1984). Where the application alleges ineffective assistance of counsel as a ground for relief, the applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland, 466 U.S. at 686, 104 S. Ct. at 2064; Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). However, pursuant to the United States Supreme Court's decision in Faretta, a Defendant has an unequivocal right to represent himself at trial once it is established that the accused knowingly and intelligently relinquishes the benefits associated with the right to counsel. See Faretta v. California, 422 U.S. 806, 835, 95 S. Ct. 2525, 2541, 45 L. Ed. 2d 562 (1975).

Here, the Court finds no merit to the Applicant's claim for relief on the ground of ineffective assistance of his previous trial counsel, Ms. Proctor. On January 27, 2009, before the Honorable R. Markley Dennis, Applicant made a motion to relieve Ms. Proctor as counsel and proceed pro se. There was a full Faretta hearing, and Judge Dennis granted the motion and requested that Ms. Proctor be available as standby counsel. It is well settled in South Carolina that Defendants have no constitutional right to hybrid representation, but may represent themselves while enjoying the advice and assistance of standby counsel. See State v. Sanders, 269 S.C. 215, 218, 237 S.E.2d 53, 54 (1977); See also Foster v. State, 298 S.C. 306, 307, 379 S.E.2d 907, 907 (1989). Applicant represented himself during this trial held February 2 – 6, 2009 before the Honorable Roger M. Young, Sr. and the jury convicted him of Murder. Thereafter, he was sentenced by Judge Young to fifty (50) years imprisonment. A motion to reconsider his sentence was filed and later granted by Judge Young on March 5, 2009, and his sentence was reduced to forty (40) years imprisonment. The Applicant filed a notice of appeal, and the Court of Appeals

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affirmed his conviction and denied a petition for rehearing. Subsequently there was a petition for writ of certiorari to the Supreme Court, which was also denied. On September 9, 2015, an initial evidentiary hearing on the Applicant's PCR application, filed April 4, 2013, was held before the Honorable Larry B. Hyman. At the hearing, the State made a Motion for Summary Judgment as to his ineffective assistance of trial counsel claim, as Applicant acted as his own counsel at trial. Judge Hyman granted the summary judgment motion, noting that Applicant made a conscious and voluntary decision, and that decision has been reviewed by the trial court and the appellate courts as well. (Transcript of Evidentiary Hearing at 18:7-16, Terrell McCoy v. State, September 9, 2015).

As such, the issue that trial counsel was ineffective was heard and disposed of on September 9, 2015 before Judge Hyman and was not appealed. Further, if it is interpreted that his Order granting summary judgment is interlocutory in nature then the matter is preserved for further review. Thus, it is the law of this case, and this Court has no authority to disturb Judge Hyman's ruling. Based on the foregoing procedural history, the applicable law stated above and review of the record in this case, the Court finds that the Applicant has failed to establish any entitlement to relief on the ground of ineffective assistance of trial counsel. Moreover, the Court would note that the Applicant failed to call Ms. Proctor as a witness thereby eliminating the Court's ability to make an independent factual determination as to what advice, if any, Ms. Proctor provided to the Applicant regarding the consequences of his proceeding pro se in the trial of this matter. The Court notes that it does not find the Applicant's testimony regarding this issue credible or persuasive. Therefore, the Motion to Alter/Amend on this basis is denied.

The Court's Denial of Applicant's request to Proceed Pro Se

"It is well established that an accused may waive the right to counsel and proceed *pro se*." State v. Brewer, 328 S.C. 117, 119, 492 S.E.2d 97, 98 (1997); See also State v. Fuller, 337 S.C. 236, 523 S.E.2d 168 (1999). That right must be preserved even if the court believes that the defendant will benefit from the advice of counsel, or even if the decision to proceed pro se may be to the defendant's own detriment. See State v. Brewer, 328 S.C. 117, 492 S.E.2d 97 (1997). However, a defendant's right to waive the assistance of counsel is not unlimited. "The right to proceed *pro se* must be clearly asserted by the defendant prior to trial." State v. Brewer, 328 S.C. 117, 119, 492 S.E.2d 97, 98 (1997) (citing State v. Sims, 304 S.C. 409, 405 S.E.2d 377 (1991)); See also United States v. Lorick, 753 F.2d 1295 (4th Cir.1985). "If the request to proceed *pro se* is made after trial has begun, the grant or denial of the right to proceed *pro se* rests within the sound discretion of the trial judge." State v. Winkler, 388 S.C. 574, 586, 698 S.E.2d 596, 602 (2010) (citing State v. Fuller, 337 S.C. 236, 241, 523 S.E.2d 168, 170 (1999).

Here, the proceeding before the Court was an evidentiary hearing and not a trial. Moreover, the hearing began at or around 10:21 a.m. on December 14, 2015 and ended at approximately 12:05 p.m. Applicant made no attempt to release Mr. Davis prior to the start of the evidentiary hearing. In fact, the Applicant did not attempt to relieve his attorney until the end of the evidentiary hearing following the Court's request for closing arguments. (Transcript of Evidentiary Hearing at 68:19 – 69:1, Terrell McCoy v. State, December 14, 2015). The Applicant and the State both advised the Court that they would not be calling anymore witnesses, signaling a clear end to the proceedings. (Id. at 68:14-18). The evidentiary hearing was complete, the parties had rested their presentations with the exception of closing argument, when the Applicant made his request to relieve Mr. Davis as counsel. Due to the timing of the Applicant's request, there existed no

necessity for the Court to conduct a full Faretta hearing for proceedings that were, for all intents and purposes, concluded at the time the request was made. Further, it was clear from the conduct of the Applicant that the timing of his request was an attempt to delay and preclude the Court from ruling on the merits of his application.

Alleged Brady Violations and Prosecutorial Misconduct

"A Brady claim is based upon the requirement of due process. Such a claim is complete if the accused can demonstrate (1) the evidence was favorable to the accused, (2) it was in the possession of or known to the prosecution, (3) it was suppressed by the prosecution, and (4) it was *material* to guilt or punishment." Gibson v. State, 334 S.C. 515, 524, 514 S.E.2d 320, 324 (1999) (citing Kyles v. Whitley, 514 U.S. 419, 432–42, 115 S.Ct. 1555, 1565–69, 131 L.Ed.2d 490, 505–10 (1995)); Brady v. Maryland, 373 U.S. 83, 87, 83 S. Ct. 1194, 1196, 10 L. Ed. 2d 215 (1963); State v. Von Dohlen, 322 S.C. 234, 241, 471 S.E.2d 689, 693 (1996) (emphasis added). This rule applies to impeachment evidence as well as exculpatory evidence. See United States v. Bagley, 473 U.S. 667, 676, 105 S.Ct. 3375, 3380, 87 L.Ed.2d 481, 490 (1985). Further, prosecutorial misconduct is not an issue for post-conviction relief. Rather, this allegation is a direct appeal issue that is procedurally barred by S.C. Code Ann. § 17-27-20(b) (2003). Post-conviction relief is not a substitute for an appeal. Simmons v. State, 264, S.C. 417, 423, 215 S.E.2d 883, 885 (1974). A post-conviction relief application cannot assert any issues that could have been raised at trial or on appeal. Drayton v. Evatt, 312 S.C. 4, 8, 430 S.E.2d 517, 520 (1993). The failure to do so has waived the allegation as grounds for relief.

Affidavit Regarding 911 tape

"If a Brady violation is found to have occurred, PCR must be granted." Riddle v. Ozmint, 369 S.C. 39, 44, 631 S.E.2d 70, 73 (2006); See Gibson v. State, 334 S.C. 515, 514 S.E.2d 320

(1999). Evidence is material under Brady if there is a "reasonable probability" that the result of the proceeding would have been different had the information been disclosed. E.g., State v. Proctor, 358 S.C. 424, 595 S.E.2d 480 (2004). The question is not whether petitioner would more likely have been acquitted had this evidence been disclosed, but whether, without this impeachment evidence, he received a fair trial "resulting in a verdict worthy of confidence." Riddle v. Ozmint, 369 S.C. 39, 44–45, 631 S.E.2d 70, 73 (2006) (citing Kyles v. Whitley, at 434, 115 S.Ct. 1555).

Here, Applicant asserts that the State violated Brady and engaged in prosecutorial misconduct by failing to disclose a 911 recording to the Defendant during his trial. During the hearing, the Court allowed Applicant to mark as Exhibit 1[6] an affidavit from Kriston D. Neely, Esq. of the North Charleston Legal Department. The Affidavit states that the City, the North Charleston Police Department and Applicant were involved in litigation of the Applicant's claim in Case Number: 2013-CP-10-6876. The Affidavit further states that during the course of the litigation the City admitted that a 911 recording and CAD report had existed. According to Mr. Neely's Affidavit the 911 recording was destroyed on June 25, 2006 and the CAD report was destroyed on March 25, 2009 in compliance with the retention policies of the State of South Carolina and the City of North Charleston. The Applicant was in possession of the CAD report/dispatch log ("CAD report"), which is evidenced by his cross-examination of Officer Jason Roy regarding the CAD report during his trial. (Transcript of Trial Record at 514:24 – 516:24, State v. Terrell McCoy, February 2-6, 2019). At no time during Applicant's cross-examination of Officer Jason Roy, did Applicant attempt to enter the CAD report into the record. Moreover, at the close of the Applicant's defense, standby trial counsel informed Judge Young

[6] The State consented to the admission of the Affidavit.

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that Applicant wished to discuss an issue about a witness. (Id. at 631:15-16). Thereafter, the Applicant stated he tried to subpoena, J. Fowler, who was the dispatcher with North Charleston Police Department ("NCPD") that accepted the 911 call in connection to the victim's murder. (Id. at 631:18 – 632:1). Applicant sought J. Fowler's appearance at trial in order to elicit testimony that a female rather than a male made the 911 call. (Id.). Judge Young questioned the parties at length as to the whereabouts of the 911 recording. Ms. Proctor informed the Court that she tried since the first trial three years prior to obtain the tape, but that she was never able to get it and did not believe the solicitor's officer ever possessed the 911 tape. (Id. at 633:10-14). Mr. Wetmore also advised the trial judge that he never heard a 911 recording and that he did not have a copy of the 911 recording. (Id. at 634:1-5). Further, Mr. Wetmore informed the trial judge that he could not stipulate – as requested by the defense – to the contention that a female made the 911 call because he did not know who made the call, the person would not be subject to cross-examination, and the information would ultimately be hearsay. (Id. at 635:6-17). The trial record is abundantly clear that the solicitor's office did not have the 911 tape in its control or possession. This fact was solidified by Ms. Proctor's contention that she has been unable to obtain the recording for the last three (3) years when she represented Applicant. The record also shows that at the end of the discussion regarding the missing 911 recording, Applicant, again, made no effort to enter the existing CAD report into the record. (Id. at 637:1-9).

Current Supreme Court precedent asserts that "individual prosecutor[s] [have] a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police." Kyles v. Whitley, 514 U.S. 419, 437, 115 S. Ct. 1555, 1567, 131 L. Ed. 2d 490 (1995). Though it is now evident that a 911 tape may have existed at the time of Applicant's trial, the Court is not convinced that this creates a "reasonable probability" that the result of the

Applicant's trial would have been different had the 911 tape been disclosed by the police. The Applicant was free to further investigate the existence of a 911 recording and subpoena the necessary agency, but failed to do so while acting as his own attorney. In fact, his previous attorney, Ms. Proctor, asserted that she subpoenaed the 911 recording, but was never able to obtain it. The Applicant raised the issues regarding the 911 recording and CAD report during the course of his trial, and Judge Young made it clear that he could not create a 911 recording that neither party ever had in their control or possession. The record, as preserved, indicated that there was no viable issue to appeal when the record was clear that the State did not think a 911 tape existed and was not in control or possession of the same. Moreover, Applicant cross-examined Officer Jason Roy about the contents of the CAD report, in which he testifies to the entire contents of the report including the portion that indicates the victim advised that a black male came busting through her door with gunshot wounds in his body, which Applicant could have used to impeach Ms. Williams' credibility. In fact, Applicant was able to cross-examine Ms. Williams regarding her three (3) differing statements she gave police, which included the story about a guy breaking through her door with gunshot wounds, which is the exact same information relayed to the 911 dispatcher.

The Court finds that there was no Brady violation on behalf of the State. Further, the Court finds that even without the 911 recording, the Applicant was able to cross-examine the witnesses in detail regarding the contents of the CAD report at length. The Applicant's trial resulted in a verdict worthy of confidence. Therefore, the Court cannot find that appellate counsel[7] was

[7] Mr. Dudek testified at the hearing that he did not remember an issue about a 911 recording, but that he vaguely remembered an issue concerning a dispatch log. (See Transcript of Evidentiary Hearing 25:6-18). He never stated he was "unaware" of the 911 issue as mischaracterized in the Applicants Rule 59(e) Motion. Further, the Rule 59(e) Motion, again, mischaracterizes Mr. Dudek's testimony in that he never said "that if he had known of the 911 tape spoliation issue...it would be reversible error and an appellate issue." (See Rule 59(e) Mot. p. 7). Speaking generally, Mr. Dudek testified that depending on the nature of the evidence allegedly suppressed and the ability of the evidence to help the defense, he would agree that withholding such items would be a Brady violation. (Id. at 26:9-23).

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ineffective for failing to raise a Brady violation as to the 911 tape and corresponding CAD report. Further, the Court finds there is no objective evidence in the record to support that the Assistant Solicitor or the North Charleston Police Department(NCPD) engaged in deliberate acts to destroy evidence to support any allegations of spoliation of the 911 tape or CAD report. Thus, the Motion to Alter/Amend on this basis is denied.

Admission of Brandon Cuttino's Statement

In his PCR application, Applicant alleged that appellate counsel was ineffective for failing to raise the issue of whether the trial judge erred by allowing Brandon Cuttino's statement into evidence. This Court finds Applicant failed to present any evidence at the evidentiary hearing regarding such allegations. The only mention of erroneously admitted witness testimony came in the form of a general question by Mr. Davis during his direct examination of Mr. Dudek, where he asks appellate counsel "[y]ou are aware of cases that have been reversed for admitting witness statements into evidence erroneously?" (Transcript of Evidentiary Hearing at 28:24 – 29:1, Terrell McCoy v. State, December 14, 2015). Applicant, nor his attorney, elicited any testimony regarding the erroneous admission of statements made by the witness Brandon Cuttino, therefore, the issue, though alleged in his PCR application, is waived. Accordingly, this Court deemed the allegation abandoned by the Applicant.

Testimony of Victim

Applicant contends that certain witness testimony was in possession of the prosecution and not provided to the Defense during his second trial. More specifically, Applicant testified that a witness, Ms. Corinda Williams, testified at the first and second trial, but that she gave testimony that was unfamiliar to the Applicant and different from what she testified to in the first trial.

On direct examination, the Applicant asserts he was never made aware of her differing statements prior to her taking the stand. Conversely, on cross examination, Applicant testified that he was provided three (3) statements Ms. Williams gave the police, and was able to cross-examine her concerning those statements. More specifically, during Applicant's cross-examination of Ms. Williams during his trial, he asked, "You gave three different statements, but in two of your tapes you said you didn't know who committed this crime?" (Transcript of Trial Record at 105:13-15). Ms. Williams replied that she did tell the police she didn't know the identity of the suspect, but that she identified the Applicant the second time. (Id. at 106:8-10). Upon a review of the trial record, the third statement the witness provided to the police mirrored her in-court testimony, and she admitted countless times that she was not initially forthcoming with the truth. (Id. at 93:21 – 94:4).

The Court can find no evidence of a Brady violation where the Applicant admits he was given all three (3) statements the State possessed, and had the opportunity to and did cross-examine Ms. Williams concerning the alleged inconsistencies in all of her statements. Further, if Ms. Williams testified inconsistently, Applicant had the capacity and should have considered procuring a copy of the transcript from the first trial in order to impeach her with the inconsistent statements. Therefore, the Motion to Alter/Amend on this basis is denied.

DNA evidence not tested and Angela Bunker's Testimony

The Applicant further testified that the State's failure to collect certain blood evidence at the scene constituted a Brady violation appellate counsel failed to raise on appeal. Applicant testified that there was blood evidence – such as blood DNA left on walls, a doorknob, a window, and in the woodwork on a window leading to the backyard – that was never collected or sent to SLED by the NCPD. During his trial, Applicant made pretrial motions regarding the

alleged failure of the NCPD to collect the aforementioned blood evidence and made contemporaneous objections which were denied by the trial judge, thus preserving the issue for appeal.

Applicant has failed to produce any blood evidence which he claims was part of the Brady violation. Further, it is not a Brady violation to not test evidence if investigators do not find its necessary, and if no evidence was ever collected there can be no withholding of exculpatory evidence in violation of Brady. Therefore, the Court cannot find appellate counsel ineffective for failing to raise the non-collection of certain evidence at the scene on appeal, when he did not feel, in his professional opinion, this was something Applicant would have prevailed upon. Thus, the Motion to Alter/Amend on this basis is denied.

Prosecutorial Misconduct

The Applicant has raised the issue of prosecutorial misconduct on the above-mentioned alleged Brady violations. More specifically, the Applicant asserts that the State failed to provide all the statements from the victim, a 911 call, CAD report, and blood evidence not collected at the scene. For the reasons set forth above in regard to each alleged Brady violation, the Court cannot discern any evidence of prosecutorial misconduct or wrongdoing in this case. The Applicant has not met his burden of proving actual prosecutorial misconduct, therefore, this allegation is dismissed.

Based upon careful consideration of the record in this case, including any submissions of the parties, this Court has discovered no findings of fact or conclusions of law that have been overlooked or misapprehended, and this Court is not persuaded to alter or amend its judgment. Applicant has presented no novel facts, arguments, or theories in support of his Motion to Alter or Amend. Moreover, Applicant has not highlighted any portions of the record this Court may have

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misunderstood, failed to fully consider, or perhaps failed to rule on. Accordingly, the Applicant's Motion to Alter or Amend is hereby DENIED.[8]

IT IS SO ORDERED.

Hon. Deadra L. Jefferson
Presiding Judge
Ninth Judicial Circuit

14th day of June, 2019
Charleston, South Carolina

[8] This motion is disposed of without the necessity of a hearing and decided on the record, written motion, and briefs. Rule 59(f), SCRCP; Pollard v. City of Florence, 314 S.C. 397, 401-402, 444 S.E.2d 534, 536 (Ct. App. 1994).